

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 27, 2014

v

JUAN CRUZ,

Defendant-Appellant.

No. 314440
Wayne Circuit Court
LC No. 12-005516-FC

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 40 to 90 years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction, with the sentences consecutive to one another and 615 days' jail credit. Defendant appeals as of right. We affirm.

I. ADMISSION OF PHOTOGRAPHS

Defendant contends that the trial court erred in admitting photographs of the victim, which did not establish any fact at issue, created sympathy for the victim, and were unfairly prejudicial. We disagree.

“A decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.” *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). “A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes.” *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012), lv held in abeyance 828 NW2d 381 (2013) (citation and internal quotation marks omitted).

“Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403. Photographs may . . . be used to corroborate a witness' testimony, and [g]ruesomeness alone need not cause exclusion.” *Gayheart*, 285 Mich App at 227 (citations and internal quotation marks omitted).

Generally, photographs that are merely calculated to arouse the sympathies or prejudices of the jury should not be admitted. However, if a

photograph is otherwise admissible for a proper purpose, it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime. [*People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997) (citations omitted).]

In *Gayheart*, 285 Mich App at 227-228, this Court stated:

In the case at bar, defendant's intent was directly in issue because it was an essential element of premeditated murder and felony murder. The photographs were helpful in proving defendant's intent to kill because they illustrated the nature and extent of the victim's injuries. The photographs were also helpful in explaining and corroborating the witnesses' testimony concerning the victim's cause of death. Photographs may properly be used to corroborate other evidence and are not excludable simply because they are cumulative of a witness's oral testimony. The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself. The photographs admitted in this case specifically corroborated the testimony concerning the cause of the victim's death and the nature and extent of her fatal injuries. We conclude that the photographs were relevant because the issue of defendant's intent to kill was of consequence to the determination of the action, and a finding of intent to kill was made more probable by the nature and extent of the injuries as depicted in the photographs.

We also conclude that the photographs were highly probative and that their probative value was not outweighed by the danger of undue prejudice. Although certain of the pictures appear gruesome, their admission was helpful in proving that the victim had been intentionally killed and in corroborating the trial testimony. As already noted, [g]ruesomeness alone need not cause exclusion. We cannot say that the probative value of the photographs was substantially outweighed by the danger of undue prejudice. The trial court did not abuse its discretion by admitting the photographs into evidence. [Citations and internal quotation marks omitted; alteration in original.]

Defendant argues that the trial court erred in admitting People's Exhibits 3, 9, and 12. However, People's Exhibit 12 was never admitted; rather, People's Exhibit 8 was admitted. People's Exhibit 3 is a morgue photograph of the victim's head, showing the gunshot wound to the left side of her head. People's Exhibit 9 is a crime scene photograph of the victim's body on the stairs. People's Exhibit 8 is also a crime scene photograph of the victim's face, showing the upper portion of her body wrapped in a blanket on the stairs.

People's Exhibit 3 was relevant to showing defendant's intent to kill because it shows "the nature and extent of the victim's injuries." *Gayheart*, 285 Mich App at 227. The issue of defendant's intent to kill was at issue because defendant was charged with second-degree murder, which requires showing "intent to kill, the intent to cause great bodily harm, or the intent to take an action whose natural tendency is to cause death or great bodily harm, wantonly and willfully disregarding that risk." *People v Portellos*, 298 Mich App 431, 443; 827 NW2d 725 (2012). Also, defendant's theory was that the shooting was an accident. The photograph also

corroborated the medical examiner's testimony concerning the cause of death—a contact gunshot wound. See *Gayheart*, 285 Mich App at 227. The photograph is, however, gruesome. The medical examiner explained that the photograph showed “softened decomposing brain that is outside of the wound that has been spread on to the hair.” However, gruesomeness alone does not require exclusion. *Gayheart*, 285 Mich App at 225 (citation omitted). Defendant argues that this photograph was cumulative because he was prepared to stipulate to the admission of the “morgue photographs.”¹ However, the medical examiner's drawings do not actually show the injury or the severity of the injury. Also, “[t]he jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself.” *Gayheart*, 285 Mich App at 227. Defendant also argues that he was prepared to stipulate that there was a contact gunshot wound. “Because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements, the elements of the offense are always ‘in issue’ and, thus, material.” *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). People's Exhibit 3 was highly probative and the probative value was not substantially outweighed by the danger of unfair prejudice. See MRE 403. Further, the trial court excluded People's Proposed Exhibit 2, another photograph that showed the gunshot wound, that the trial court determined was more gruesome. The trial court did not abuse its discretion in admitting People's Exhibit 3. See *Gayheart*, 285 Mich App at 227.

People's Exhibit 9 was relevant to showing the location of the victim's body on the stairway. See *Howard*, 226 Mich App at 550 (concluding that the trial court did not abuse its discretion in admitting photographs of a victim's body at the crime scene where the location where the victim was shot was at issue). People's Exhibit 8 was relevant to showing that the victim's body was wrapped in a blanket. These facts showed what happened to the victim's body and were relevant to show intent to kill. These photographs also corroborated the testimony of the evidence technician, Brian Reichmann, regarding where and how the victim's body was found, as well as the testimony of defendant's ex-girlfriend, Rosa Torres, regarding defendant's admission to shooting the victim and wrapping her in a bag or blanket. See *Gayheart*, 285 Mich App at 227. These photographs were also gruesome. Defendant argues that he was not challenging where the body was found and it could be established by the officers' testimony. As noted, gruesomeness alone does not require exclusion and photographs may be used to corroborate testimony. See *Gayheart*, 285 Mich App at 227. Also, People's Exhibits 6 and 7, other photographs of the scene, do not show the stairs or the blanket; they merely show the victim's foot or feet near a door. Again, the trial court considered several photographs and only admitted a limited number. The trial court did not abuse its discretion in admitting People's Exhibits 8 and 9. See *Gayheart*, 285 Mich App at 227.

¹ Although defendant states “morgue photographs,” it appears that he is referring to the medical examiner's drawings and diagrams, part of People's Exhibit 1.

II. PRIOR ACTS OF DOMESTIC VIOLENCE

Next, defendant contends that the trial court erred in admitting evidence of other acts of domestic violence against the victim and Torres. We disagree.

“We review the trial court’s ultimate decision to admit the evidence for abuse of discretion.” *People v Meissner*, 294 Mich App 438, 444-445; 812 NW2d 37 (2011). “A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes.” *Douglas*, 296 Mich App at 191 (citation and internal quotation marks omitted).

MCL 768.27b provides:

(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

(2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

(3) This section does not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law.

(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

(5) As used in this section:

(a) “Domestic violence” or “offense involving domestic violence” means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.

(ii) Placing a family or household member in fear of physical or mental harm.

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(b) “Family or household member” means any of the following:

(i) A spouse or former spouse.

(ii) An individual with whom the person resides or has resided.

(iii) An individual with whom the person has or has had a child in common.

(iv) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, “dating relationship” means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(6) This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006.

In *Meissner*, 294 Mich App at 451, this Court stated:

MCL 768.27b(1) provides, in pertinent part, that in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence offered against a criminal defendant is, by its very nature, prejudicial to some extent. Exclusion of the evidence is appropriate only when *unfair* prejudice outweighs the probative value of the evidence, meaning there is a danger that the evidence will be given undue or preemptive weight by the jury or it would be inequitable to allow use of the evidence. [Emphasis in original.]

In *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011), this Court stated:

Accordingly, this Court must make two distinct inquiries under the balancing test of MRE 403. First, this Court must decide whether introduction of [the defendant’s] prior-bad-acts evidence at trial was unfairly prejudicial. Then, this Court must apply the balancing test and weigh the probativeness or relevance

of the evidence against the unfair prejudice. Upon completion of this second inquiry, this Court can determine whether the trial court abused its discretion in allowing [the defendant's] prior bad acts into evidence. [Footnote with citation and internal quotation marks omitted.]

The relevant considerations in determining whether to exclude evidence under MRE 403 include:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*People v Watkins*, 491 Mich 450, 487-488; 818 NW2d 296 (2012) (footnote with citation omitted).]

The evidence of defendant's other acts of domestic violence admitted at trial, and to which defendant objects, include (1) Torres's testimony that defendant hit, kicked, slapped, cut, choked, and pointed a gun at her, (2) the victim's family member's testimony that they saw the victim with bruises, (3) the testimony of the victim's mother, Rebecca Lugo, that she saw bullet holes at the victim's apartment, and (4) the testimony of the victim's cousin, Lisa Reyna, that defendant slammed into her car. The trial court admitted this evidence under MCL 768.27b and MRE 403.

Defendant was accused of an offense involving domestic violence as he was accused of causing physical harm to the victim, with whom he had a dating relationship. See MCL 768.27b(1), (5)(a)(i), (5)(b)(iv). The evidence was relevant to showing defendant's intent and that the victim's death was not an accident. See *Cameron*, 291 Mich App at 612 (prior bad acts relevant to showing the defendant's actions were not accidental).

With regard to the relevant considerations under MRE 403, the prior acts, other than Reyna's testimony about the incident involving the car, were somewhat similar to the charged offense, as they involved physical harm or a gun. Nonetheless, "[p]rior acts of domestic violence can be admissible under MCL 768.27b regardless of whether the acts were identical to the charged offense." *Meissner*, 294 Mich App at 452. The acts against Torres occurred throughout the nine years before the charged offense and at least one occurred near the time of the charged offense. The acts against the victim had to have occurred within the nine months before the charged offense, while the victim and defendant dated, and one witness saw bruises on the victim in December 1988. The acts against Torres occurred frequently. It was not clear how often the acts against the victim occurred. There was no evidence of intervening acts. The evidence lacked some reliability since Torres may have had a motive to testify against defendant, the victim's family did not witness defendant harm the victim, other than the incident involving the car, and defendant did not have any prior convictions for domestic violence. Finally, there was a need for the testimony, as the victim and defendant did not testify. Overall, the evidence was not unfairly prejudicial and the probative value of the evidence was not outweighed by the danger of

any unfair prejudice. See *Meissner*, 294 Mich App at 451. The trial court did not abuse its discretion in admitting the evidence. See *id.* at 444-445.

Defendant argues that the evidence was not admissible under MRE 404(b). This Court has stated: “Notwithstanding [the prohibition in MRE 404(b)], however, in cases of domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant’s character or propensity to commit the same act.” *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010). Thus, the evidence need not be admissible under MRE 404(b).

III. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor’s misconduct in (1) appealing for sympathy, and (2) arguing facts not supported by the evidence, denied him a fair trial. We disagree.

“In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error.” *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object to the prosecutor’s alleged appeal for sympathy during her opening statement. Thus, this issue is unpreserved. Defendant objected to the statement made during closing argument. Thus, this issue is preserved.

“Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial.” *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). “Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights.” *Brown*, 294 Mich App at 382. “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect.” *Bennett*, 290 Mich App at 475-476 (citations and internal quotation marks omitted).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor’s remarks in context.” *Brown*, 294 Mich App at 382-383 (citations omitted).

IV. APPEAL FOR SYMPATHY

“Appeals to the jury to sympathize with the victim constitute improper argument.” *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). In *People v Mayhew*, 236 Mich App 112, 122; 600 NW2d 370 (1999), the defendant argued that he was denied a fair trial by the prosecutor’s statement during opening that “the decedent’s wife had lost both a husband and a friend.” The defendant further argued that “during closing argument, the prosecutor attempted to emblazon in the minds of the jurors the decedent’s memory by making comments and displaying a photograph of the decedent.” *Id.* The Court stated:

The prosecutor’s comments, in the context of the complete opening and closing arguments, were not blatant appeals to the jury’s sympathy and were not

so inflammatory that defendant was prejudiced. The opening remarks were proper comments regarding the evidence the prosecutor intended to present. The display of the decedent's picture and accompanying comments during closing argument were only a brief part of the prosecutor's argument. We conclude that any possible prejudice could have been cured by an instruction had defendant objected and that our failure to further review the issue will not result in a miscarriage of justice. [*Id.* at 123 (citations omitted).]

In *Watson*, 245 Mich App at 591-592, this Court similarly found no prejudice where the prosecutor's comment was isolated, she did not blatantly appeal to the juror's sympathy, the comment was not so inflammatory as to prejudice the defendant, and the trial court instructed the jury that it should not be influenced by sympathy or prejudice. Further, in *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003), this Court stated:

This alleged instance of misconduct occurred when the prosecutor stated during closing arguments, "Vito Davis is not here. Mr. Davis does not have a son, Mrs. Davis does not have a son, his brother doesn't have a brother, his cousin does not have a cousin." This Court has held that "[a]ppeals to the jury to sympathize with the victim constitute improper argument." In this case, however, the prosecutor's comment was isolated and not overly inflammatory, and the prosecutor did not blatantly appeal to the jury's sympathy. The trial court instructed the jury not to let sympathy or prejudice influence its verdict. Under these circumstances, defendant was not prejudiced by the prosecutor's remark, and reversal is not required. [Citations omitted.]

During her opening statement, the prosecution stated: "That's what happened on June 13, 1989 when this defendant, you'll hear testimony, took a mother away from her four year old son, her seven year old daughter and her eight year old daughter." This statement was similar to the statements made in *Akins* and *Mayhew*. As in those cases, the statement was isolated, not overly inflammatory, and the prosecutor did not blatantly appeal to the jury's sympathy. See *Akins*, 259 Mich App at 563 n 16; *Mayhew*, 236 Mich App at 123. It was also a proper comment on the evidence that the prosecution intended to present. See *Mayhew*, 236 Mich App at 123. Further, the trial court instructed the jury that the lawyers' statements and arguments were not evidence. See *id.* at 123 n 5. Moreover, an instruction that the jury should not let sympathy or prejudice influence its verdict could have cured any possible prejudice. See *Akins*, 259 Mich App at 563 n 16. Accordingly, there was no plain error affecting defendant's substantial rights and reversal is not required. See *Brown*, 294 Mich App at 382; *Bennett*, 290 Mich App at 475-476.

V. ARGUING FACTS NOT SUPPORTED BY THE EVIDENCE

"Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *Watson*, 245 Mich App at 588. Ralph Openshaw, the officer in charge of the case in 1989, testified as follows:

Q. Okay. Did you do anything to try and confirm that through phone records that such a phone call had been made?

A. No, sir. I don't believe I did.

Q. And subpoenaing phone records was not an unusual event for Homicide detectives, depending on the circumstances; right?

A. It happens not frequently but it happens.

Q. If it would help support a case?

A. It would.

During her rebuttal closing argument, the prosecution stated:

James. He wants to say the phone call didn't happen, that there is a phone call, phone record. Today everybody's got cell phones. Today you can look at now [sic] there is all kind of technology as far as phone records. Back in 1989 people had a house phone. You follow?

If all of you can remember having a house phone what your bill showed, it shows long distance calls that you made. That's what your bill showed back then.

You think you can get information about who called you from a pay phone and where they called from and all that? The police weren't doing that kind of, you know, they weren't seeking that kind of evidence back then because it wouldn't be there.

You're not going to get and [sic] incoming call, a local call. You're going to get outgoing, long distance calls. That's what's on your phone bill.

Defendant objected and the trial court stated, "[t]he jury heard the testimony."

Openshaw's testimony was that he did not obtain phone records and phone records were infrequently obtained. Thus, he suggested that phone records would have been available in 1989. The prosecutor did not argue that phone records were unavailable, but that the contents of those records would not have been helpful, as they would not have contained incoming local calls. At most, her argument regarding what phone bills showed in 1989 appeared to be unsupported by the testimony. However, such statements could be considered a reasonable inference from the evidence, as Openshaw suggested that phone records would have been obtained if they would have been helpful to the case. Further, the prosecutor's statements were made in response to defense counsel's argument during closing that if the police had obtained the phone records, they could have determined where the call came from, which was also not supported by the evidence. "[T]he prosecution's remarks must be considered in light of defense counsel's comments and that [a]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008) (citation and internal quotation marks omitted). Finally, the trial court instructed the jury that the lawyers' statements and arguments were not evidence. "[J]urors are presumed to follow their instructions." *Unger*, 278 Mich App at 235. Accordingly, defendant was not denied a fair trial. See *Brown*, 294 Mich App at 382-383.

VI. RIGHT TO A FAIR TRIAL

Defendant contends that he was denied a fair trial by (1) the prosecutor's statement that was not supported by the evidence, and (2) the admission of evidence regarding the victim's daughter's efforts to reopen the case against defendant. We disagree.

"Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *Bennett*, 290 Mich App at 475. Evidentiary issues are reviewed for an abuse of discretion. *Meissner*, 294 Mich App at 444-445.

A. PROSECUTOR'S STATEMENT

With regard to the prosecutor's statement regarding the phone records, as discussed above in Issue III, *supra*, defendant was not denied a fair trial. The prosecutor's statement could be a reasonable inference from the evidence, it was made in response to defense counsel's argument, and the trial court instructed the jury that the lawyers' statement and arguments are not evidence.

B. ADMISSION OF RAMIREZ'S TESTIMONY

The victim's daughter, Theresa Ramirez, testified regarding her efforts to get law enforcement to reopen the case against defendant. Defendant argued that Ramirez's involvement was not relevant and only served to make Ramirez more sympathetic and believable. The prosecution argued that her testimony was relevant to explaining why it took so long to prosecute defendant and why a federal agent was involved. The trial court ruled that the testimony was relevant to showing why it took so long for the case to go to trial and regarding the quality of the investigation in 1989. The trial court further ruled that Ramirez's efforts reflected on her credibility.

Defendant's claim that Ramirez's testimony constituted improper vouching and was improperly admitted "is as much an evidentiary issue as it is a prosecutorial misconduct matter." *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). Therefore, this Court "focus[es] on whether the prosecutor elicited the testimony in good faith." *Id.* at 71. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *Id.* However, Ramirez did not vouch for the credibility of another witness. Rather, defendant's claim is that Ramirez's testimony improperly vouched for her own credibility. Moreover, the prosecution argued that the testimony was relevant and there is no indication that it acted in bad faith. See *id.* Accordingly, defendant was not denied a fair trial. See *Bennett*, 290 Mich App at 475. The trial court did not abuse its discretion in admitting the evidence. See *Meissner*, 294 Mich App at 444-445.

VII. SENTENCING

Defendant contends that he was denied due process of law because the trial court sentenced him to a term of imprisonment that exceeded the *Cobbs*² sentence evaluation, leaving the appearance of vindictiveness for defendant's exercising his constitutional right to a jury trial.

Defendant did not preserve this issue by objecting at or before sentencing.³ See *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003). "Alleged sentencing errors that have not been preserved are reviewed for plain error affecting substantial rights." *Id.*

In *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993) (emphasis in original), the Michigan Supreme Court held that "[a]t the request of a party, and not on the judge's own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." The Court stated: "The judge's preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources." *Id.* From this language, defendant extrapolates that, "*absent* significant new facts, the *Cobbs* evaluation should be followed." He argues that all of the facts referenced by the trial court in sentencing defendant were known before the trial court gave the *Cobbs* evaluation and, therefore, the trial court's decision to exceed the *Cobbs* evaluation gave the appearance of impropriety.

The trial court indicated that if defendant were to plead, it would impose a sentence of 20 to 40 years' imprisonment for second-degree murder, plus two years for felony-firearm. In sentencing defendant, the trial court exceeded the judicial guidelines, which it noted were advisory, and sentenced defendant to 40 to 90 years' imprisonment for the second-degree murder conviction. The trial court found several objective and verifiable reasons to depart from the guidelines, including: (1) the victim was shot at point blank range, (2) defendant fled to Mexico and lived for 22 years, (3) the victim's three children were deprived of their mother and were separated from one another, and (4) the victim was stuffed in a sleeping bag and left for days. The trial court gave these circumstances as reasons to exceed the guidelines, not to exceed the *Cobbs* evaluation. The trial court did not indicate why it exceeded the *Cobbs* evaluation. These circumstances were known by the trial court before trial. Nonetheless, the Court in *Cobbs* did not state that a trial court is required to give reasons for exceeding the *Cobbs* evaluation, and defendant provides no authority to support that there is such a requirement. Accordingly, there was no plain error affecting defendant's substantial rights. See *Callon*, 256 Mich App at 332.

² *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

³ Defendant objected to the trial court's exceeding the guidelines, but did not object to the trial court's exceeding the *Cobbs* evaluation.

VIII. CUMULATIVE ERROR

Defendant contends that the cumulative effect of the trial court's errors, prosecutorial misconduct, and ineffective assistance of counsel requires that he be granted a new trial. We disagree.

“For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.” *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). This issue was not raised before, addressed by, or decided by the trial court. Therefore, it is unpreserved. “This Court reviews unpreserved claims for plain error affecting a defendant's substantial rights.” *People v Gibbs*, 299 Mich App 473, 492; 830 NW2d 821 (2013).

“We review this issue to determine if the combination of alleged errors denied defendant a fair trial.” *Dobek*, 274 Mich App at 106.

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted. Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. [*Id.* (citations omitted).]

In this case, defendant failed to establish any errors. Accordingly, there can be no cumulative effect of errors requiring reversal. See *Dobek*, 274 Mich App at 106.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder